

ESTTA Tracking number: **ESTTA268690**

Filing date: **02/25/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048879
Party	Plaintiff NOR-CAL BEVERAGE CO., INC.
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Submission	Reply in Support of Motion
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Signature	/R. Michael West/
Date	02/25/2009
Attachments	92048879_REPLY_MtnCompel.pdf (10 pages)(105689 bytes) 92048879_REPLY_MtnCompel_RMW_Dec-REDACTED.pdf (8 pages)(570957 bytes) 92048879_REPLY_MtnCompel_CAS_Dec-REDACTED.pdf (4 pages)(96978 bytes) CertificateServiceREPLY.pdf (1 page)(43392 bytes)

IN THE UNITED STATES TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 2,227,005

Trademark: GO GIRL

NOR-CAL BEVERAGE CO., INC.

Petitioner And Counterclaim Defendant,

v.

IRENE J. ORTEGA, dba GOGIRL ACTIVEWEAR

Respondent And Counterclaim Plaintiff

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) Cancellation No. 92048879
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PETITIONER’S REPLY TO RESPONDENT’S OPPOSITION
TO PETITIONER’S MOTION TO COMPEL DISCOVERY

PETITIONER NOR-CAL BEVERAGE CO., INC. (hereinafter, “NOR-CAL”), files its Reply to RESPONDENT IRENE J. ORTEGA’s (hereinafter, “ORTEGA”) Opposition To Petitioner’s Motion To Compel Discovery (hereinafter, “Motion To Compel”).

Contrary to ORTEGA’s assertions, the infirmities of ORTEGA’s original responses to the discovery have not been corrected by ORTEGA’s supplemental responses. Accordingly, several important discovery issues remain to be resolved by the Board.

PETITIONER'S MEMORANDUM

A. Introduction

As discussed in the Motion To Compel, NOR-CAL initiated the pending Cancellation proceeding on the grounds that Federal Registration No. 2,227,005, for GO GIRL, is subject to cancellation under 15 U.S.C. § 1064(3). ORTEGA brought a Counter-claim for cancellation of NOR-CAL's Registration No. 3,235,947, based upon ORTEGA's assertion of common law rights in the term "Go Girl."

The discovery propounded by NOR-CAL, which is the subject of this Motion To Compel, sought among other things, evidence of ORTEGA's claimed dates of first use as a trademark, ORTEGA's evidence of trademark usage in connection with all of the goods recited in the '005 Registration, the substantiality of ORTEGA's claimed trademark usage throughout the United States, and ORTEGA's claims of actual customer confusion. This information and evidence is critical to the ORTEGA's assertions of common law rights and NOR-CAL's defense of the Counter-claim.

Subsequent to the filing of the Motion To Compel, ORTEGA served Supplemental Responses to NOR-CAL's First Set Of Interrogatories (attached as "**Exhibit 2**" to the Declaration Of Barry F. Soalt In Opposition To The Motion To Compel Discovery).

On January 20, 2009, ORTEGA's documents, produced in response to NOR-CAL's First Set Of Request For Production Of Documents, were delivered to NOR-CAL's counsel. The documents were provided in electronic form on a CD-ROM Disk, arranged in numerous separate electronic folders. Almost 6,000 pages of documents produced numbered "IJO000001 through IJO005958". In numerous cases, there are several unrelated documents within a single folder. No

index of the documents was provided. (Declaration Catherine Ashley Straight, ¶¶ 2 and 3 filed herewith)

Even a cursory review of ORTEGA's Supplemental Responses ("Exhibit 2" to Soalt Declaration) establishes the extreme over-inclusiveness of identified documents purportedly responsive to a particular Interrogatory. In each instance, hundreds or thousands of documents have been identified; and, with respect to some Interrogatory questions, ALL 5,958 documents are listed.

As shown following, ORTEGA failed to provide adequate supplemental responses to the Interrogatories. Instead, ORTEGA simply listed hundreds (or in some cases, thousands) of documents which, upon review, were NOT responsive to the particular Interrogatory question. For example, NOR-CAL requested documents evidencing ORTEGA's claimed date of first use of "Go Girl" as a trademark; in response, ORTEGA listed the numbers of hundreds of document—NONE of which evidenced trademark usage back to the date asserted.

B. ORTEGA's Supplemental Responses Fail To Correct Infirmities Of Original Response

(1) Respondent's Failure To Provide Complete Responses To Interrogatories

ORTEGA's Supplemental Responses to the Interrogatories are as non-responsive as her original responses. The following discussion is representative of the responses ORTEGA provided.

In Interrogatory No. 1(a) and (b), ORTEGA was questioned regarding her date of first use of "Go Girl" as a trademark, and whether ORTEGA had continuous use of the term as a trademark. In Interrogatory 1(f) ORTEGA was asked to identify the documents which evidenced her answers to Interrogatory No. 1(a) and 1(b).

In her Supplemental Response to Interrogatory 1(a), ORTEGA claimed a first use as a trademark by her predecessor of June 21, 1996, and a first use as a trademark by ORTEGA of October 1, 1998. ORTEGA then lists hundreds of documents which she asserts evidence such dates of use. Most of the documents identified relate to dates of 2000 or later, and many documents relate to use and/or trademark applications or registrations of third parties, rather than to Respondent. Also included are some print-outs from United States Patent and Trademark Office TESS or TARR data bases, a few of which allege dates of first use. However, no documents identified by Respondent actually evidence trademark use in 1996, or 1998, as asserted by Respondent. (Declaration Straight, ¶ 4)

With respect to Interrogatory 1(b), ORTEGA stated her use of the term as a trademark was continuous, and identified ALL 5,958 documents as evidencing such use. Thousands of the documents identified do not refer or relate in any manner to trademark use by Respondent, let alone support or evidence such use. (Declaration Straight, ¶ 5)

By letter sent to ORTEGA 's counsel by facsimile on February 4, 2009, counsel for NOR-CAL set forth a detailed explanation, with specific examples, regarding the fact that ORTEGA's Supplemental Responses failed to correct the infirmities of her original responses. A copy of the February 4, 2009 letter from Mr. West to Mr. Soalt is attached as "**Exhibit H**" to the Declaration of R. Michael West filed herewith.

In **Exhibit H**, ORTEGA's responses to Interrogatory No. 1(a), 1(b) and 1(f) are discussed in detail. The chart included as an attachment to **Exhibit H** describes the documents identified by ORTEGA in her Supplemental Response as evidencing her answer to Interrogatory 1(a) . A review of **Exhibit H** will confirm that the documents identified by ORTEGA do not

evidence the dates of trademark use claimed by ORTEGA. In fact, in the almost 6,000 documents produced by ORTEGA, *no documents evidence trademark use back to the dates asserted in ORTEGA's responses.* (Declaration Straight, ¶ 4) ORTEGA should be supplement her responses and delete all references to documents which do not evidence or support her first use of “Go Girl” as a trademark.

Interrogatory No. 2 sought identification of persons “most knowledgeable regarding such contentions, facts, and documents.” ORTEGA’s Supplemental Response is no different than her original response—ORTEGA simply identified herself and “others familiar with Ortega’s brand and business” and “see also documents produced in response to Request for Production.” ORTEGA identified thousands of documents, none of which is responsive. This answer remains inadequate and evasive. If such persons are known, they must be identified, as they may be material witnesses.

The Supplemental Response to Interrogatories 3 is likewise inadequate and evasive. Specific information is not provided and thousands of non-responsive documents are identified.

Interrogatory No. 9 requested the identification of persons most knowledgeable regarding instances of actual confusion alleged by ORTEGA. The Supplemental Response is the same as the original response. Part of the answer asserts “new customers” have been confused without any identification of such persons. If they are not known, it is not responsive to allege that they exist without any basis for such a contention. ORTEGA again identifies one of her suppliers only by name, without the information sufficient to allow NOR-CAL to subpoena a witness. Again, ORTEGA lists thousands of documents, none of which is responsive to the Interrogatory.

Interrogatory 10 requests identification of persons who are most knowledge regarding certain affirmative answers alleged by ORTEGA to have a basis in fact. ORTEGA’s Supplemental

Response still does not identify any persons who have knowledge regarding these contentions. ORTEGA continues to state that “Discovery is continuing,” which is simply not responsive.

In Interrogatory No. 11(b), ORTEGA was asked to identify the documents which support or substantiate the claims of use of the GO GIRL mark, in connection with each of the goods recited in Reg. No. 2,227,005. In her Supplemental Response, ORTEGA identified ALL 5,958 documents. A review of **Exhibit H** (including the chart which describes several hundred of these documents), and of **Exhibit I**, clearly establish that the identified documents do NOT substantiate trademark use in connection with the listed goods—in fact, most of the documents are totally irrelevant respecting such use. This purported Supplemental Response is no response at all and is an abuse of discovery.

In her Initial Disclosures, ORTEGA identified only herself and Petitioner’s employees as having knowledge of any of the fact relevant to this proceeding. ORTEGA has never supplemented her Initial Disclosures as required to identify any additional persons with such knowledge.

ORTEGA should not be allowed to cover up the fact that she does not have facts and documents to support her claims by identifying thousands of non-responsive documents. ORTEGA should be ordered to provide complete and proper supplemental responses to Petitioner’s First Set Of Interrogatories, Nos. 1(f), 2, 3, 4, 9, 10, 11(b).

(2) Respondent’s Overdesignation Of Requested Documents As “CONFIDENTIAL”

Although ORTEGA has finally produced copies documents in electronic form, she continues to designate documents as “CONFIDENTIAL” for which no good faith claim of confidentiality could be made. The overdesignation of documents as “CONFIDENTIAL” creates

a great burden on NOR-CAL, its counsel, and on the Board, as all such documents, as well as briefs and orders disclosing or discussing the content of such documents, must be filed under seal.

The Stipulated Protective Order entered in this proceeding states that:

“no Material shall be marked as ‘Confidential’, unless the designating party and its/her attorney believe in good faith that the Material constitutes or includes Trade Secrets under California law, or that the Material constitutes or includes confidential and proprietary business information, the disclosure of which to the other party and/or to the public causes or would likely cause it/her economic harm or damage.”

On January 20, 2009, correspondence from ORTEGA’s counsel was delivered to NOR-CAL’s counsel which included a Disk containing an electronic copy of documents numbered IJO000001 through IJO005958. More than five thousand (5,000) of ORTEGA’s documents are marked as “CONFIDENTIAL.” (Declaration Straight, ¶¶ 2, 3 and 7).

Attached to the Declaration of Straight, and filed *under seal* as required by the Protective Order, as “**Exhibit I**,” are true and accurate copies of an extremely small sampling of documents which are designated as CONFIDENTIAL. A review of these documents will confirm that there could be no good faith belief that any of these documents constitute either a trade secret, or confidential and proprietary information, the disclosure of which would likely cause harm, as required under the Stipulated Protective Order. They include, *inter alia*, newspaper advertisements, advertising flyers of third parties, flyers regarding events open to the public, UPS labels, blank order forms, print-outs of products offered for sale to the public on e-Bay, print-outs from web-sites of third parties, outside covers of file folders, envelopes, catalogs, and public documents. (Declaration Straight, ¶¶ 6, 7 and 8, **Exh. I**)

There are several thousand documents which are similar in nature to the sampling attached as Exhibit I, which are designated as CONFIDENTIAL, but for which no good faith belief

could be held in that designation. From the very nature of these documents, it is evident that the vast majority of the documents have already been disclosed to third parties and/or to the public. (Declaration Straight, ¶¶ 9 and 10)

Accordingly, no claim of confidentiality, much less trade secret status, can reasonably be made for these documents. ORTEGA should be required to withdraw the “CONFIDENTIALITY” designation with respect to all such documents, including but not limited to those identified in the responses to Requests Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38.

(3) Respondent’s Failure To Provide Copies Of Requested Documents

As indicated above, ORTEGA finally produced certain documents on January 20, 2009. However, it appears that not all documents may not have been produced.

In Paragraph 2 of Respondent’s Supplemental Responses (Opposition: Soalt Declaration, Exhibit 2), ORTEGA states that “It is anticipated that further discovery, independent investigation, . . . will supply additional facts and documentation.” ORTEGA asserts that she retains the right “to produce evidence of subsequent documents. . .”

Some types of documents, which would have been anticipated, were not among the documents produced. By way of example, ORTEGA produced documentation respecting her California State Board of Equalization Seller’s Permit, but produced none of the required reports which must ORTEGA must file relating to her sales.

NOR-CAL sought documents which evidence ORTEGA’s claimed dates of first use as a trademark in commerce, and which evidence ORTEGA’s assertions of common law rights. ORTEGA has not produced any documents which evidence her claimed date of first use of “Go Girl”

as a trademark. NOR-CAL requested that ORTEGA identify the documents which supported her assertion of common law rights in the term “Go Girl.” In response, ORTEGA identified each and every one of the 5,958 documents produced! However, these documents are mostly irrelevant and do not support ORTEGA’s claim of sales throughout the United States as she has asserted.

If ORTEGA has additional documents, she should be ordered to produce them by a date certain—and not allowed to withhold documents to be produced later.

C. Continued Attempts by NOR-CAL To Resolve Dispute

By letter sent to ORTEGA’s counsel by facsimile on February 4, 2009, counsel for NOR-CAL set forth a detailed explanation, with specific examples, regarding the fact that ORTEGA’s Supplemental Response failed to correct the infirmities of her original responses. (Declaration West, “Exhibit H”).

In an effort to resolve the discovery issues involved in this Motion To Compel, Mr. West’s February 4th letter offered extended time for ORTEGA to provide adequate and proper responses, and to suspend the pending Motion To Compel. ORTEGA did not respond to this offer.

CONCLUSION AND ORDER REQUESTED

NOR-CAL is entitled to pursue discovery regarding the issues and contentions formulated by the pleadings in this case. It is apparent that without the intervention of the Board, NOR-CAL’S right to conduct and complete discovery will be denied and its legal rights will be compromised. In light of the foregoing, NOR-CAL urges the Board to order that:

1. Further Supplemental Answers be provided to Interrogatories 1(f), 2, 3, 4, 9, 10,

11(b), by a date certain, in full compliance with FRCP 33(a), including a Verification for the Supplemental Answers.


2. The designation of the documents made the subject of Requests Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 as "CONFIDENTIAL" be withdrawn.

3. Any additional documents requested in Petitioner's First Request For Production Of Documents And Things Under Rule 34 be produced by a date certain, accompanied by a statement that no additional responsive documents exist.

4. The date for Close Of Discovery be reset for three (3) months following the ruling by the Board on this Motion To Compel, and all other time periods be reset accordingly.

Respectfully submitted,

Dated: February 25, 2009
Sacramento, California


R. Michael West
Attorney For Petitioner

Filed Herewith: Declaration Of R. Michael West
Including Exhibit H
Declaration Of Catherine Ashley Straight
Including Exhibit I

The correspondence address, and
the telephone and facsimile numbers
for this communication are:

R. Michael West
The Law Offices Of
R. Michael West
1922 21st Street
Sacramento, California 95811
Telephone: (916)-444-5444
Facsimile: (916)-444-5441

IN THE UNITED STATES TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 2,227,005

Trademark: GO GIRL

NOR-CAL BEVERAGE CO., INC.	)	Cancellation No. 92048879
)	
Petitioner And Counterclaim Defendant,	)	A PORTION OF EXHIBIT H
	)	ATTACHED HERETO IS
v.	)	FILED UNDER SEAL
	)	PURSUANT TO THE
IRENE J. ORTEGA, dba GOGIRL ACTIVEWEAR	)	PROTECTIVE ORDER
)	
Respondent And Counterclaim Plaintiff.	)	<i>REDACTED VERSION FOR</i>
	/	<i>PUBLIC INSPECTION</i>

DECLARATION OF R. MICHAEL WEST
REGARDING FURTHER ATTEMPTS TO RESOLVE DISCOVERY ISSUES

I, R. Michael West, declare and state as follows:

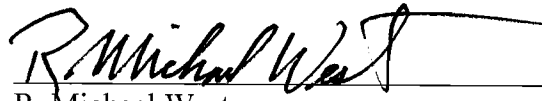
1. I am an attorney at law, and am Petitioner's counsel of record in connection with this Cancellation proceeding. I have personal knowledge of the facts contained in this Declaration, and I could and would testify competently to these facts if called as a witness.

2. This Declaration is made under 37 C.F.R. § 2.120(e), and includes statements of counsel for Petitioner, regarding the good faith efforts made to resolve with opposing counsel, the issues presented in the accompanying Motion To Compel Discovery.

3. Attached hereto, and identified as “**Exhibit H**,” is a true and accurate copy of my letter dated February 4, 2009, sent via facsimile on that date to Respondent’s Counsel, Barry F. Soalt, regarding the still outstanding discovery disputes, setting forth facts and examples establishing that the Supplemental Responses did not cure the inadequacies of the initial Responses, and offering an extension of time to provide further Supplemental Responses.

I declare under penalty of perjury, under the laws of the United States, that the facts set forth in this Declaration are true, that all statements made of my own knowledge are true, and that all statements made on information and belief are believed to be true.

Dated: February 25, 2009


R. Michael West

Attachment: **Exhibit H**

R. MICHAEL WEST
ALSO MEMBER OF ARIZONA BAR

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INTELLECTUAL PROPERTY LAW
PATENTS TRADEMARKS COPYRIGHTS
TRADE SECRETS AND UNFAIR COMPETITION

February 4, 2009

File 10761-Cancel

Via Facsimile

Barry F. Soalt, Esq.
Procopio, Cory, Hargreaves & Savitch LLP
530 B Street, Suite 2100
San Diego, California 92101-4469

Re: Nor-Cal Beverage Co., Inc. v. Irene J. Ortega - Cancellation No. 92048879
Respondent Irene J. Ortega DBA GoGirl Activewear's Supplemental Response To
Petitioner's First Set Of Interrogatories (Nos. 1, 2, 3, 4, 9, 10, and 11)

Dear Barry:

I have now had an opportunity to review Respondent Irene J. Ortega DBA GoGirl Activewear's Supplemental Response To Petitioner's First Set Of Interrogatories (Nos. 1, 2, 3, 4, 9, 10, and 11).

Unfortunately, Respondent Ortega's Supplemental Response fails to correct the infirmities of the original responses.

The documents were provided in electronic form on a CD-ROM, arranged in numerous separate folders. In many cases, there are several unrelated documents within a single folder. No index of the documents was provided.

An entire folder of documents, or several folders of documents, are specified in each Supplemental Response requesting identification of documents, although only a few of the documents are even arguably responsive to the particular request. In some cases, it even appears that there are no documents whatsoever which support Respondent's Supplemental Response to an Interrogatory. The listing of the documents is therefore over-inclusive, and the identification provided is both inaccurate and non-responsive.

By way of example only, I will address a few of the Interrogatories and Respondent's Supplemental Responses, illustrating the issues raised above.

Petitioner's Interrogatory No. 1

Do YOU use the term GO GIRL or any variants thereof as a trademark? If so, with respect to such use:

- a. State the date such use commenced;
- b. State whether such use has been continuous from the date of such first use to the present.
- f. Identify representative documents which support, evidence, reflect, or explain YOUR answers to subsections a-e, supra.

Respondent's Supplemental Response

- a. GO GIRL - used since June 21, 1996 by Applicant's predecessor-in-interest acquired by assignment on June 22, 2001; first used by Applicant since October 1, 1998.

GO GIRL ACTIVEWEAR - used since October 1, 1998.

GO GIRL SPORTSWEAR - used since October 1, 1998.

- b. Applicant's use of GO GIRL and GO GIRL ACTIVEWEAR has been continuous since the first use.

- f. See documents responsive to Request for Production:

- a. IJO003655-IJO003693, IJO004951-IJO004954, IJO004978-IJO004991, IJO004999-IJO005002, IJO005004-IJO005005, IJO005009-IJO005083, IJO005092, IJO005138-IJO005162, IJO005329-IJO005370, IJO005625-IJO005653, IJO005837-IJO005880, IJO004884, IJO005930- IJO005948, IJO005958;
- b. IJO000001-IJO005958;

Discussion Of Issues Surrounding Supplemental Response

Attached hereto is a description of the documents which were identified in the Supplemental Response to **Interrogatory 1(a)**. The Interrogatory requests identification of documents which support or evidence the *dates upon which use of Go Girl as a trademark* commenced.

Barry F. Soalt, Esq.
February 4, 2009
Page 3

Respondent stated that the date use **commenced** was June 21, 1996 by her predecessor, and October 1, 1998 by Respondent. However, included in the Supplemental Response are numerous documents which clearly do not evidence nor support the dates set forth in the answer to the Interrogatory. By way of example, Respondent has listed documents which relate to:

claims of infringement of the Go Girl term in October 2003 and November 2005;

many print outs from the United States Patent and Trademark Office website records in TESS and TARR respecting unrelated trademark registrations and applications [assignment recording documents for Reg. No. 2,227,005 while arguably relevant to other issues, contain no support nor evidence respecting the answer to this Interrogatory];

an envelope from the PTO with no addressee indicated and no legible date [clearly not supportive of *any fact or assertion*];

informational booklet of the USPTO respecting trademarks [cannot possibly support or evidence commencement of trademark use of a particular term];

Respondent Ortega's business license applications and documents over a ten (10) year period, fictitious business name filing documents, and limited liability company filings with the California Secretary of State [such documents may provide some evidence for use of a term as a tradename, but they do not evidence or support use as a trademark on goods];

documents related to Respondent Ortega's §§ 8 & 15 filings in 2004 [affidavits filed five (5) years after registration generally not evidence or support of the date of commencement of the use];

documents respecting revocation of power of attorney, appointment of Respondent's current counsel, and change of correspondence address respecting Reg. No. 2,227,005 in 2004 [change of representation and/or correspondent in 2004 is completely irrelevant to, and not supportive in any way, of a commencement of use in 1996 or 1998]; and

several pages of exchange between Respondent's counsel's secretary respecting correction of the drawing for Reg. No. 2,138, 339 (mark is a design of a dragon) for a completely unrelated registration (presumably another client of said counsel).

As to **Interrogatory 1(b)**, requesting the identification of documents which evidence or support the claimed *continuous use* of Go Girl *as a trademark*, Respondent has specified **every single document produced** [IJO000001-IJO005958]. This renders the Supplemental Response completely non-responsive. Obviously, as discussed above with respect to commencement of use, many of the

Barry F. Soalt, Esq.
February 4, 2009
Page 4

categories of documents do not support trademark use by Respondent **at all**. In addition, Respondent has included documents such as Petitioner's trademark Go Girl® for its energy drink products as somehow supporting or evidencing Respondent's use as a trademark. This is simply ludicrous.

The manner in which these Supplemental Responses has been made constitutes an abuse of discovery. Respondent must identify only the documents which are responsive to each of the Interrogatory parts, and not list numerous documents which on their face are irrelevant and non-responsive.

In the alternative, if there are no such documents, Respondent must state that no documents are in Respondent's possession or control which support or evidence Respondent's answers to the particular Interrogatory.

There are also issues surrounding your client's Supplemental Response to **Interrogatory No. 9**. This Interrogatory is directed toward the discovery of any instances of actual confusion. As to the documents identified, they do not pertain even remotely to instances of actual confusion. With respect to answers for which no documentary support exists, your client must state so, not just set forth a list of non-responsive documents. A subsection of this Interrogatory also requested the identification of persons with knowledge of facts of such instances, if any. In response, your client claims that persons or customers allegedly have been "confused"; however, no persons have been specifically identified. Accordingly, either the full identification of such persons, along with the address and telephone numbers and the facts regarding which the person has knowledge must be disclosed, or the statement that such persons exist must be withdrawn.

Issues With Document Production, Namely, Over-Designation Of Documents As "Confidential"

As to the documents produced in electronic form, almost every document was identified as "Confidential", meaning that only counsel and persons specially qualified under the terms of the Protective Order can view any documents. Petitioner's Motion To Compel identified numerous document requests which involved documents clearly not of a confidential nature. Yet as things stand, none of the documents which your client has produced, may be viewed or reviewed by my client. This is not reasonable, nor does it achieve the purposes of the Protective Order. This issue can only be resolved if you take the list which I have compiled in the Motion, compare it to the documents which you have produced, and remove the "Confidential" designations as appropriate.

Summary

In light of the facts that Respondent's Supplemental Response was served after Petitioner's Motion To Compel Discovery was filed, and the Supplemental Response does not cure the inadequacies of the initial Responses, Petitioner will not withdraw its pending Motion To Compel.

EXHIBIT H

Barry F. Soalt, Esq.
February 4, 2009
Page 5

Petitioner is willing, however, to grant a two (2) week extension of time to your client: (1) either to respond to the Motion; or (2) to provide further Supplemental Responses in accordance with the issues raised above, including the production of any additional responsive documents which may exist, and to remove the "Confidential" designation for documents which are either publicly known, or which otherwise are not truly "attorney's eyes only" documents.

If you elect option (2), the Motion To Compel will be suspended until we have an opportunity to review the further Supplemental Responses.

In either case, it will be your responsibility to prepare a draft of the Stipulation, FAX it to me for review and approval, and then you must file it with the TTAB.

Sincerely yours,


R. Michael West

RMW/cb
Enclosure: as stated

PORTION OF EXHIBIT H

CONSISTING OF 3 PAGES OF THE CHART ATTACHED TO FEBRUARY 4, 2009 LETTER, WHICH DESCRIBE AND DISCUSS THE CONTENTS OF CERTAIN DOCUMENTS PRODUCED BY RESPONDENT IRENE J. ORTEGA WHICH WERE LABELED “CONFIDENTIAL” ARE REDACTED FROM THE PUBLIC VERSION OF THIS EXHIBIT – SUCH ARE FILED UNDER SEAL AS REQUIRED PURSUANT TO THE STIPULATED PROTECTIVE ORDER

IN THE UNITED STATES TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 2,227,005

Trademark: GO GIRL

NOR-CAL BEVERAGE CO., INC.)	
	)	Cancellation No. 92048879
)	
Petitioner And Counterclaim Defendant,	)	FILED UNDER SEAL
	)	PURSUANT TO
v.	)	PROTECTIVE ORDER
)	
IRENE J. ORTEGA, dba GOGIRL ACTIVEWEAR)	
	)	<u>REDACTED VERSION FOR</u>
Respondent And Counterclaim Plaintiff.	)	<u>PUBLIC INSPECTION</u>
	/	

DECLARATION OF CATHERINE ASHLEY STRAIGHT
IN SUPPORT OF REPLY TO OPPOSITION TO MOTION TO COMPEL

I, Catherine Ashley Straight, declare and state as follows:

1. I am an attorney at law, and am an associate of Petitioner's counsel of record in connection with this Cancellation proceeding. I have personal knowledge of the facts contained in this Declaration, and I could and would testify competently to these facts if called as a witness.

2. On January 20, 2009, correspondence from Respondent's counsel, Barry F. Soalt, was delivered to the Law Offices Of R. Michael West. ORTEGA's documents, produced in response to NOR-CAL's First Set Of Request For Production Of Documents, were contained therein. The

documents were provided in electronic form on a CD-ROM Disk, arranged in numerous separate electronic folders. Almost 6,000 pages of documents produced numbered "IJO000001 through IJO005958". In numerous cases, there are several unrelated documents within a single folder. No index of the documents was provided.

3. I personally looked at every document contained on the Disk.

4. I reviewed Respondent Supplemental Response to Interrogatory 1(a) and I reviewed each document identified by Respondent in her Supplemental Response to Interrogatory 1(f) as evidence or support for her answer to Interrogatory 1(a). I prepared the chart describing the identified documents which is included in "**Exhibit H.**" Most of the documents identified relate to dates of 2000 or later, and many documents relate to use and/or trademark applications or registrations of third parties, rather than to Respondent. Also included are some print-outs from United States Patent and Trademark Office TESS or TARR data bases, a few of which allege dates of first use. However, no documents identified by Respondent actually evidence trademark use in 1996, or 1998, as asserted by Respondent. In addition, in the almost 6,000 documents produced by ORTEGA, no documents evidence trademark use back to the dates asserted by ORTEGA in her responses.

5. I reviewed Respondent Supplemental Response to Interrogatory 1(b). Respondent identified all 5,958 documents in her Supplemental Response to Interrogatory 1(f) as evidence or support for her answer to Interrogatory 1(b). Thousands of the documents identified do not refer or relate in any manner to trademark use by Respondent, let alone support or evidence such use.

6. I have reviewed the Stipulated Protective Order which states that

"no Material shall be marked as 'Confidential', unless the designating party and

its/her attorney believe in good faith that the Material constitutes or includes Trade Secrets under California law, or that the Material constitutes or includes confidential and proprietary business information, the disclosure of which to the other party and/or to the public causes or would likely cause it/her economic harm or damage.”

7. Based upon my review, more than five thousand (5,000) of Respondent’s documents are marked as “CONFIDENTIAL.”

8. Attached hereto, and identified as “**Exhibit I**,” are true and accurate copies of an extremely small sampling of documents which are designated as CONFIDENTIAL, for which there could be no good faith belief that such constitute either a Trade Secret, or confidential and proprietary information, the disclosure of which would likely cause harm, as required under the Stipulated Protective Order.

9. There are several thousand documents which are similar in nature to the sampling attached as Exhibit I, which are designated as CONFIDENTIAL, but for which no good faith belief could be held in that designation.

10. From the very nature of the documents I reviewed, it is evident that the vast majority of these documents designated as CONFIDENTIAL have already been disclosed to third parties and/or to the public.

I declare under penalty of perjury, under the laws of the United States, that the facts set forth in this Declaration are true, that all statements made of my own knowledge are true, and that all statements made on information and belief are believed to be true.

Dated: February 23, 2009

Attachment: **Exhibit I**


Catherine Ashley Straight

EXHIBIT I

CONSISTING OF 28 PAGES OF DOCUMENTS, CONSTITUTING A SMALL SAMPLING OF THE DOCUMENTS PRODUCED BY RESPONDENT IRENE J. ORTEGA WHICH WERE LABELED “CONFIDENTIAL” ARE REDACTED FROM THE PUBLIC VERSION OF THIS DECLARATION WHICH IS FILED UNDER SEAL AS REQUIRED PURSUANT TO THE STIPULATED PROTECTIVE ORDER

IN THE UNITED STATES TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Reg. No. 2,227,005

Trademark: GO GIRL

NOR-CAL BEVERAGE CO., INC.

Petitioner And Counterclaim Defendant,

v.

IRENE J. ORTEGA, dba GOGIRL ACTIVEWEAR

Respondent And Counterclaim Plaintiff.

Cancellation No. 92048879

CERTIFICATE OF
SERVICE

I hereby certify that a copy of the documents described following:

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO COMPEL DISCOVERY;

DECLARATION OF R. MICHAEL WEST REGARDING FURTHER ATTEMPTS TO RESOLVE DISCOVERY ISSUES with EXHIBIT H, and *Redacted Version of* DECLARATION OF R. MICHAEL WEST REGARDING FURTHER ATTEMPTS TO RESOLVE DISCOVERY ISSUES with *portion of* EXHIBIT H *redacted*;

DECLARATION OF CATHERINE ASHLEY STRAIGHT IN SUPPORT OF REPLY TO OPPOSITION TO MOTION TO COMPEL with EXHIBIT I, and *Redacted Version of* DECLARATION OF CATHERINE ASHLEY STRAIGHT IN SUPPORT OF REPLY TO OPPOSITION TO MOTION TO COMPEL with *Exhibit I redacted*.

were mailed on the date set forth opposite my signature, by First Class Mail, postage prepaid, and addressed as follows:

Barry F. Soalt, Esq.
Procopio, Cory, Hargreaves & Savitch, LLP
530 B Street, Suite 2100
San Diego, California 92101

Dated: February 25, 2009



Lee Chase